UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	)	
	)	
JEAN CAMERON BERGAUST	)	Case No. 00-13724-SSM
	)	Chapter 13
Debtor	)	

MEMORANDUM OPINION

A hearing was held in open court on May 8, 2002, on the motion filed by the debtor's attorney, Scott H. Donovan, P.C., on April 22, 2002, to require the chapter 13 trustee, Gerald M. O'Donnell, to pay previously approved supplemental counsel fees ahead of payments to secured creditors. The trustee opposes the motion on the ground that the terms of the confirmed plan plainly make the payment of approved administrative expenses subject to the fixed monthly payments he is required to make to the secured creditors. Because the law firm had motions for approval of supplemental counsel fees in 14 other cases, and the same issue was presented, the court took the motion under advisement.

Background

Jean Cameron Bergaust filed a voluntary petition for the adjustment of her debts under chapter 13 of the Bankruptcy Code in this court on September 11, 2000. She was represented in connection with the filing of the petition by Scott H. Donovan, Esquire, of the law firm of Scott H. Donovan, P.C. The disclosure of compensation required by § 329(a), Bankruptcy Code, and Fed.R.Civ.P. 2016(b) states that the firm had agreed to accept $1,250.00 to represent the debtor in her case, of which $315.00 had been paid prepetition

and $935.00 remained to be paid. The debtor's plan filed on September 25, 2000, provided for the payment to the chapter 13 trustee of $350.00 per month for 60 months, for total plan funding of $21,000.00. The only debts dealt with by the plan were arrearages on the debtor's home mortgage and on her homeowners association assessments.[1] These arrearages were to be cured, without interest, by fixed monthly payments from the trustee of $233.34 and $66.67 per month, respectively, with the debtor making the regular payments becoming due post-petition. The plan included the following provision with respect to priority administrative claims:

> **B-2 PAYMENTS TO PRIORITY CREDITORS**
>
> a. **Priority Creditors Under 11 U.S.C. § 1326(b)**. The following priority creditors shall, *subject to payments to secured creditors*, be paid in full at or before the time of payment to remaining creditors.
>
> 1. Trustee: 10% of all sums disbursed, except any funds returned to debtor.
>
> 2. Debtor's Attorney: $935.00 balance due of total fee of $1,250.00

Plan, § B-2 (emphasis added). The plan was confirmed without objection on November 14, 2000.

Thereafter, Mr. Donovan filed on the debtor's behalf an objection to the mortgage company's proof of claim. That objection was partially mooted when the creditor filed an amended proof of claim, with the balance of the objection being overruled after a hearing. The mortgage company then filed a motion for relief from the automatic stay alleging that the debtor was four months delinquent on her post-petition mortgage payments. The debtor opposed the motion, which was resolved by entry of a consent order fixing the post-petition

[1] The schedules listed no unsecured claims.

arrearage and allowing the debtor to cure it by direct payments over a six-month period. Thereafter, the law firm filed an application on August 22, 2001, for an additional $787.50 in counsel fees "to be paid as a priority creditor under provision B-2 of the Plan." That application was granted by order entered September 13, 2001, approving the fees and directing that the firm "be paid as a priority creditor under provision B-2 of the Chapter 13 Plan...."

As clarified orally at the hearing, the present motion complains that, notwithstanding the approval of the fees more than six months ago, the chapter 13 trustee has not yet made any payment on account of them, and the law firm seeks to have those fees paid "as an administrative claim *prior to all creditors*" (emphasis added). The chapter 13 trustee responds that the reason no payment has been made is that the plan plainly makes payment of priority administrative claims "subject to" the payments to secured creditors, and he represents that he does not have sufficient funds at this time, after making the required payments to the two secured creditors, to pay the approved fees.

Discussion

A.

One of the advantages of chapter 13 over chapter 7 is that it provides a mechanism for a cash-strapped debtor who cannot afford a large retainer to employ counsel, with the attorney's being paid from future earnings through the plan. Because chapter 13 cases in which debtors are represented by counsel generally run far more smoothly than those in which debtors attempt to represent themselves, the active involvement of attorneys, not only at the commencement of the case, but also throughout the administration of the case until the

plan is successfully completed, is a desirable goal and one to be encouraged. The Bankruptcy Code permits the fees of the attorney for a chapter 13 debtor to be approved as an expense of administration. §§ 330(a(4)(B) and 503(b)(2), Bankruptcy Code. Such compensation, once approved, is treated as a first-priority claim. § 507(a)(1), Bankruptcy Code. The chapter 13 trustee is required, "[b]efore or at the time of each payment to creditors under the plan," to pay "any unpaid claim of the kind specified in section 507(a)(1)," which would include the approved fees of the debtor's attorney. § 1326(b), Bankruptcy Code. The trustee is also required, however, to distribute the payments made by the debtor "in accordance with the plan." § 1326(a)(2), Bankruptcy Code. As noted, the plan in this case specifically states that payment of approved fees to the debtor's counsel are "subject to" the payments that the trustee is required to make to the secured creditors. Given that rather clear directive, the court can only conclude that the trustee is bound by the language of the confirmed plan and is not unilaterally free to disregard it by deferring payments to the secured creditors in order to pay the approved fees.

B.

Although the motion does not in so many terms request such relief, it could be read as a motion to *amend* the confirmed plan so as to provide payment of approved counsel fees ahead of payments to secured creditors. *See* § 1329(a), Bankruptcy Code (allowing plan to be amended after confirmation "to extend or reduce the time for payments" on claims of a particular class provided for by the plan). The court is somewhat reluctant to treat the motion as such, however, because on its face the motion appears to be simply a routine motion for approval of attorneys fees. The request that the fees be paid "prior to all

creditors" is buried in the motion, and the notice does not plainly inform the secured creditors that what counsel is effectively seeking is a plan modification deferring the payments to the secured creditors until his fees are paid. Additionally, the language in Section B-2 of the plan making payment of priority administrative claims "subject to" the payments to secured creditors is essentially mandated by the Local Bankruptcy Rules, which were adopted by all the judges of this court. *See* LBR 3015-2(A)(1) & LBR Exh. 1 ("The only acceptable form for a Chapter 13 plan shall be that form approved by the Court for use in the Eastern District of Virginia."). While special circumstances might justify a departure from the standard plan language in a particular case, I am reluctant to adopt a general position that effectively reads the "subject to" language out of the required plan form. Moreover, the plan itself provides some flexibility by allowing two options for payment of secured claims by the trustee. Either a fixed monthly payment can be specified in the plan, or the trustee can be directed to make payments "on a pro rata basis." The standard form plan does not define precisely what is meant by "pro rata" (pro rata with what?), but at the very least it would seem to allow the attorneys fees to be paid concurrently with the secured claims. To be sure, a plan that does not provide a fixed schedule for payment of secured claims may draw objections on that account, particularly where the collateral (such as an automobile) is likely to depreciate in value over the term of the plan and where a fixed payment may be necessary to provide adequate protection of the secured creditor's interest. However, that is a confirmation issue, and in any event there are many cases in which a plan providing for pro rata payments is likely to be confirmable. An alternative approach would be to provide a reserve in the plan for post-confirmation attorneys fees and to calculate a

plan payment that leaves sufficient room to pay such fees. Of course, this strategy is entirely dependent on the debtor's financial ability to make the necessary plan payments.

A number of interesting policy arguments could be made as to whether the debtor's attorney should shoulder all, part, or none of the risk that the client may fall behind in making required plan payments.[2] The "subject to" language in the form plan unquestionably places substantial risk on debtor's counsel. Although debtor's counsel will come ahead of general unsecured claims, and even many priority unsecured claims (e.g., taxes), he or she nevertheless remains behind secured creditors.

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[2] *See* Jean Braucher, "An Empirical Study of Debtor Education in Bankruptcy: Impact on Chapter 13 Completion Not Shown," American Bankruptcy Institute Law Review, vol. 9, No. 2 (Winter 2001) 557, 574:

> If attorneys are paid early in plans, this might lead them to encourage chapter 13 filings without sufficient concern for whether plans would likely last long enough to be completed. Sacramento, the city with the lowest completion rate, was the only city where a substantial down payment on fees at the outset ... was common. Charlotte, the city with the highest completion rate, was the only city that routinely paid fees in the plan over a period of more than a year and a half; fees in Charlotte were typically not paid in full until three years into a plan. Delayed payment gives attorneys an incentive to fashion plans capable of lasting longer. In setting payment policies, however, some judges and chapter 13 trustees, out of commitment to promoting use of chapter 13, also take into account giving attorneys an incentive to bring cases in that chapter, and higher fees paid early in the plan serve that purpose.

An informal survey conducted in 1994 by faculty members at a Federal Judicial Center Workshop for Bankruptcy Judges revealed widely varying practices among the responding districts. For example, one paid attorneys $75.00 per month, another paid $100.00 per month, a third paid in monthly installments tailored to the need to pay priority and secured claims, while a fourth paid the attorneys before secured or priority claims. In another district, attorneys fees were paid "some prior to most secureds – some after monthly commitments – this is attorney's choice." Mary Davies Scott *et al.*, The Chapter 13 Confirmation Process (1994) 12-13.

But risks in getting paid are not unique to bankruptcy representation. Effectively, what the law firm is seeking is a general ruling that the equities always favor attorneys over secured creditors. The answer is that sometimes they may. In other circumstances they may not. Much may depend on the circumstances of a particular case. These might include the extent to which a particular secured creditor is protected by an equity cushion; whether the collateral is depreciating; whether only secured claims are being dealt with by the plan; whether the secured creditor is receiving interest on its claim; whether the attorney's efforts, in addition to benefitting the debtor (by, e.g., staving off foreclosure and protecting the family home) have also benefitted unsecured creditors (by, e.g., helping to ensure the successful completion of a plan that will pay them a meaningful dividend).

In the present case, there are no unsecured creditors. The schedules do reflect a significant equity cushion in the real estate of $88,000.00. The prepetition mortgage arrearage being paid through the plan is $14,976.53. This is being paid without interest over 60 months. In addition, there is a $2,952.05 homeowners association arrearage being paid through the plan over 60 months without interest.[3] The most recent report filed by the chapter 13 trustee reflects that the debtor is current on her monthly plan payments. The problem is that those payments are only $350.00 per month, while the trustee is required by the plan to pay $300.01 each month to the secured creditors plus his own commission. At

[3] The homeowners association has recently filed a motion for relief from the automatic stay alleging that the debtor is nearly $5,000.00 in arrears on post-petition payments. The debtor, through Mr. Donovan, has filed a response denying the allegations.

best, that leaves $15 or $20 surplus per month to pay the approved attorneys fees.[4] Because this is a 60-month plan, it cannot be extended. To make immediate payment of the remaining $787.50 owed to Mr. Donovan's firm would require a two-month moratorium on payments to the secured creditors. Given that they are not receiving interest, and that payments to them are already being stretched out over 60 months, the court cannot find that the equities favor modifying the plan to effectively defer such payments for two months in order to free up funds to pay the debtor's attorney.

C.

In so ruling, the court emphasizes that the result reached is compelled by the plain language of the plan and the lack of sufficiently compelling circumstances to justify a plan modification. It is emphatically no reflection on the quality of counsel's representation, which has been exemplary. There are a depressingly large number of chapter 13 attorneys who seemingly wash their hands of their clients' cases once a plan is confirmed. Yet it is unusual that a chapter 13 plan is completed without at least some glitches. A debtor may lose a job or incur unexpected expenses. These may result in payments to creditors outside the plan or to the trustee falling in arrears. As a result, the debtor will require sound legal analysis and advice as to whether he or she is best served by continuing in chapter 13, converting to chapter 7, or dismissing the case. In many instances there will be a need to prepare a modified plan, to defend a motion for relief from the automatic stay, or to defend a

[4] The trustee did pay the initial $935.00 requested in the confirmed plan in three more-or-less equal installments. The court can only surmise that he was able to do so because payments were not being made on account of the mortgage arrearage pending the resolution of the debtor's objection to the proof of claim.

motion to dismiss. Debtors need and benefit from the guidance of experienced attorneys post-confirmation, and attorneys should be encouraged, not discouraged, from representing them if the Congressional purpose behind chapter 13 of allowing a financially strapped individual debtor to restructure and pay his or her debts over time is to be successfully realized. The practice of law is a profession, but the court recognizes that it is also a business and must be run on sound business principles. Cash flow is the life blood of any business. Without it, an attorney could not long remain in practice. For that reason, the court is not unsympathetic to the policy argument that, in order to encourage effective representation, attorneys should be paid in chapter 13 ahead of all other claims. However, given the language of the confirmed plan in this case, and having given consideration to possible modification of the plan in this case to accomplish that goal, the court must regretfully deny the requested relief.

A separate order will be entered denying the motion to compel immediate payment of the approved fees ahead of the payments to secured creditors.

Date: May 9, 2002

/s/ Stephen S. Mitchell
Stephen S. Mitchell
United States Bankruptcy Judge

Alexandria, Virginia

Copies to:

Jean Cameron Bergaust
1548 Westmoreland Street
McLean, VA 22101
Debtor

Scott H. Donovan, Esquire
9402 Grant Avenue
Manassas, VA 20110
Counsel for the debtor

Gerald M. O’Donnell, Esquire
201 North Union St., Suite 120
Alexandria, VA 22314
Chapter 13 trustee